IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3313 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARESH TRIKAMLAL BRAHMBHATT

Versus

STATE OF GUJARAT

Appearance:

MR PARESH UPADHYAY for the Petitioner.

Mr.Kamal Trivedi, Additional Advocate General, with Ms.Harsha Devani, Assistant Government Pleader, for the Respondent.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 13/02/2002

ORAL JUDGEMENT

1. Rule. Ms.Harsha Devani, learned Assistant Government Pleader, waives service of rule on behalf of the respondent. With the consent of the parties, the matter is heard finally and it is accordingly disposed of

by this Judgment.

2. The petitioner, who was selected as Class I Officer in Gujarat Administrative Service, has challenged the order dated 13.2.1990, cancelling his appointment order as well as the subsequent order of the Department dated 9.12.2000, by which his representation is rejected.

3. The petitioner had applied for appointment to the aforesaid Class I post in response to the advertisement issued by the Gujarat Public Service Commission in November, 1985, by which applications were invited for combined competitive examination for the post of Gujarat Administrative Service Class I and Gujarat Civil Services Class I and II. The petitioner was, ultimately, selected by the GPSC and the name of the petitioner was kept at Serial No.18 in the select list of Class I Officers. On the basis of the aforesaid selection, the petitioner was to be appointed in the cadre of Gujarat Administrative Service Class I, as "Deputy Collector". It is required to be noted that the said advertisement of 1985 was issued for the posts which were created for the year 1983, 1984 and 1985. It is also required to be noted that the select list, in which the name of the petitioner figured, was for the vacancies, which had remained vacant for about 5 to 6 years. On the basis of the selection, the selected candidates were informed by the Department by way of telegram, asking them to report for duty on 26th December, 1989 at SPIPA. Copy of such telegram is annexed by the petitioner at Annexure `A', by which he was asked to remain present for duty on 26.12.1989. The said telegram is dated 22.12.1989. On the basis of the aforesaid telegraphic message, the petitioner remained present at the said place on the aforesaid date and on that very day, i.e. 26.12.1989, the appointment order was issued in favour of the petitioner. The said appointment order was given to all the selected candidates, including the present petitioner. It is mentioned in Clause 8(4) of the said appointment order that the selected candidate will be on probation for a period of two years and that the appointment in question is purely temporary and ad hoc. It is mentioned in Clause 8(2) of the said order that if a candidate fails to report at the relevant date for the purpose of training, his appointment shall stand cancelled unless some genuine reasons are pressed into service by such candidate for not reporting for training within the stipulated time. It has also been further provided in paragraph 8(4) that the appointment in question will be subject to the outcome of medical examination. It is mentioned in the said order in Clause 14 that after

completing two years' probation period satisfactorily and after completing the training and after passing the departmental examination, the Officers shall be absorbed on the relevant post. On the basis of the said order, most of the selected candidates resumed duty on the very date, i.e. 26.12.1989. However, so far as the present petitioner is concerned, he requested the Department to give him some extension of time for the purpose of joining duty, as, at the relevant time, the petitioner wanted to be sure that he is able to come out successful in the medical examination. There was some correspondence between the petitioner and the Department in connection with extension of time.

In the meantime, the petitioner also reported for medical examination on 9th January, 1990, but since some further examination was required, he was asked to report again to the Medical Superintendent, Civil Hospital, on any other subsequent date, as mentioned in the letter dated 16.1.1990, which is at Annexure `G', page 35. It is required to be noted that, in the meanwhile, on 4th January, 1990, the petitioner made a representation to the Deputy Secretary, General Administration Department, Gandhinagar, wherein he pointed out that since he is serving in the Reserve Bank of India since last 10 years, and in order to resume his duty as Deputy Collector, he will be required to give resignation from the Bank's service and for that purpose, it would be necessary for him to give one month's notice. He has also stated in the said letter dated 4.1.1990 that it was not possible for him to resume duty on 26.12.1989. He also pointed out that as per the condition prescribed in Clause 8(4) of the appointment order, his appointment is subject to medical examination and, therefore, in case he fails the medical test, his appointment can be cancelled and under such circumstances, he will be at peril of losing both the employments, i.e. employment with the Bank as well as employment with the State Government. He, therefore, requested that in view of the aforesaid practical difficulty on his part, he may be permitted to report for duty only after the medical report is available so that he can give necessary notice to the Bank. On that ground, he requested that some extension may be given for the purpose of reporting for duty. The Section Officer of the GAD informed the petitioner by letter dated 12th January, 1990 that the petitioner is given time upto 15th January, 1990 for the purpose of resumption of his duty. The petitioner was asked to report by evening of 15th January, 1990 at the office of Commissioner, Sardar Patel Institute of Public Administration, Ahmedabad, which is known as "SPIPA". The petitioner was also informed by

the said letter that no further extension will be given to him and in case, by the aforesaid date of 15.1.1990, the petitioner fails to resume duty, his appointment shall be treated to have been cancelled. However, on the very next day, i.e. on 13.1.1990, the petitioner addressed another letter to the Deputy Secretary of the GAD, wherein he pointed out that he had already undergone medical examination on 9th January, 1990 and requested the Department to inform him about the outcome of the said medical examination. He also pointed out that he is required to give one month's notice to the Bank for the purpose of resigning from his existing service from the Bank. He also requested that after ascertaining the outcome of the Medical Report, he will report for duty after giving appropriate notice to the Bank. Under the circumstances, he again prayed for extension of time for the purpose of resumption of duty. In the meanwhile, as stated earlier, the petitioner was informed by another letter dated 16.1.1990 by the Medical Board that he may again remain present for further medical examination.

4. The petitioner thereafter wrote another letter to the Deputy Secretary on 24th January, 1990, stating that since he is asked to submit himself for further medical examination and since he was not keeping good health, he will go for further medical examination within a short time and till report of such medical test is available, he may be given suitable extension for the purpose of reporting for duty. However, in pursuance of the earlier letter of the petitioner dated 13.1.1990, the petitioner was informed by a Section Officer of the GAD on 24.1.1990 that extension is given up to 5th February, 1990 and by that date, he should report for duty, and if he fails to report for duty by the aforesaid date, his appointment will be treated to have been cancelled.

Subsequently, by another letter dated 1st February, 1990, in pursuance of the earlier application of the petitioner dated 24th January, 1990, the petitioner was informed by the Section Officer that the petitioner will have to report for duty during the extended period, i.e. by 5th February, 1990, and that the petitioner should undergo medical examination within the aforesaid date. He was accordingly asked to complete the said process of medical examination by the said date and was asked to report for duty by the said date. However, as per the averment of the petitioner in the petition, the said letter dated 1st February, 1990 was received by the petitioner at a later point of time and he received the said letter on 6th February, 1990 and, in the meanwhile, the petitioner did appear for medical

examination on 5th February, 1990. Thereafter, by order dated 13th February, 1990, the appointment of the petitioner was ordered to be cancelled on the ground that the petitioner has failed to report for duty within the extended period, and on that ground, the appointment of the petitioner was ordered to be cancelled. It is required to be noted that such orders were issued against the petitioner and two other employees. Reference of the same is made in the order itself. The petitioner, thereafter, made representation by writing a letter on 21st February, 1990, requesting the Department to reconsider the aforesaid decision. The petitioner pointed out that even though he had received the letter dated 1st February, 1990 to resume duty by 5th February, 1990, he appeared before the Medical Board and that the medical examination is over and that he was awaiting the said medical report from the Department and accordingly, he was awaiting orders of the Department asking him to resume duty from a particular date and under these circumstances, he requested the Department to reconsider the said decision. He, in fact, showed his willingness to opt for the second preference, which he had given for the post of Dy.S.P. Thereafter, by letter dated 19th March, 1990, the petitioner was informed by the GAD that since the petitioner had failed to report for duty within the extended period of time, his appointment is already cancelled by order dated 13.2.1990 and that, there is no valid reason to reconsider the said decision and, therefore, the prayer of the petitioner for reconsidering the said decision was rejected. However, the petitioner again wrote another letter dated 26th March, 1990, to the Secretary of the GAD, and pointed out the factual aspect of the matter in the said representation regarding medical examination, etc. He, therefore, requested the Secretary to reconsider the case and he also requested to give him personal appointment. Since he had not received any reply to the earlier representation dated 26th March, 1990, similar request was again made by him on 12.6.1990. Further representation was again made on 27th June, 1990. Thereafter, he was informed by letter dated 6th July, 1990 that since his appointment is already cancelled as he failed to report for duty within the extended period, his case cannot be considered for appointment to the post of Dy.S.P. as per his second preference. The petitioner was asked not to make further correspondence in this behalf.

5. In view of the aforesaid stand of the Department, ultimately, the petitioner approached this Court challenging the said decision of cancellation of his appointment by filing a writ petition, being Special

Civil Application No.6598 of 1990. The aforesaid matter was admitted by this Court and, ultimately, the same was taken up for final hearing on 18th August, 2000.

After hearing the learned Advocate for the petitioner as well as the concerned AGP, this Court (Coram : R.K. Abichandani, J.) permitted the petitioner to make an appropriate representation to the Department and the Department was asked to consider the said representation sympathetically, keeping in view the high rank of the petitioner in the select list as well as the circumstances which might be pointed out by the petitioner in his representation. The Court also further observed, in the concluding part of the order, that while passing the fresh order, Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 may be taken into consideration, which provides that no person could be appointed if he had failed to pass the medical test. This Court also further observed that such fresh decision may be taken without being coloured by the order of cancellation of the petitioner's appointment made earlier. The aforesaid petition was accordingly allowed to the aforesaid extent.

6. Subsequently, in view of the aforesaid order of this Court, the petitioner made a detailed representation to the Secretary of the GAD on 31st August, 2000. In the said representation, the petitioner pointed out his difficulties in the nature of non-availability of the medical report at the relevant time. In his representation, he also pointed out the provisions of Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967. The petitioner accordingly prayed that the said issue may be reconsidered. The petitioner also pointed out that since his employment continued with the R.B.I. during the relevant period, he will not claim any right or any monetary benefit for the said intervening period. He requested that his case may be considered sympathetically.

7. Thereafter, the General Administration Department, by its detailed order dated 9.12.2000, rejected the said representation of the petitioner dated 31st August, 2000 and accordingly, the earlier order of 13.2.1990, by which the appointment of the petitioner was cancelled, remained as it is. The aforesaid order dated 9.12.2000, which is passed on the basis of the order of this Court in Special Civil Application No.6598 of 1990, has given fresh cause of action to the petitioner in challenging the decision of the Department cancelling his

appointment to the post in question.

8. Mr.Paresh Upadhyay, learned Advocate appearing for the petitioner, argued the matter at length and pointed out various factual aspects to substantiate his say that the order in question, by which order of his appointment was cancelled, suffers from arbitrariness, and, according to him, in the facts and circumstances of the case, the petitioner has successfully demonstrated that there was justifiable reasons available with him for not reporting for duty even during the extended period at the relevant time. Mr.Upadhyay has also relied upon the provisions of Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967, which, according to him, justify the action of the petitioner in so far as the failure on the part of the petitioner to report for duty at the relevant time without medical report being made available to him is concerned. Mr.Upadhyay has also relied upon the Government Resolution dated 31st March, 1989, which is at page 26 Annexure `C', laying down that an employee should be given one month's joining time if he is recruited by way of direct recruitment. Mr.Upadhyay, therefore, submitted that in view of the clear-cut provision in Rule 5 as well as in view of the observations made by this Court in earlier Special Civil Application, the Department should have considered the decision properly and should have reconsidered the order of cancellation of the appointment order of the petitioner. Mr.Upadhyay also further submitted that the manner in which extension was granted to the petitioner for a few days itself shows that the Department acted in a most unrealistic and arbitrary manner. Mr.Upadhyay also further submitted that since the petitioner was already in service in the Reserve Bank of India, it was but natural for him to ask for reasonable time for the purpose of joining duty, as he wanted to be sure that there is a proper medical examination report available with him and only on such medical report, he was willing to report for duty. He further submitted that it is not open for the Department to insist that the employee should join duty first and, therafter, to report for medical examination after joining duty. Mr.Upadhyay also submitted that unless a person is medically fit, he should not have been asked to report for duty, as such insistence is contrary to the Rules. He also submitted that, considering the facts of the present case, and considering the fact that the petitioner was already serving in the Reserve Bank of India, his insistence for complying with Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 was justified as the petitioner may

not be subjected to the peril of losing both the employment at a time. He, therefore, submitted that it cannot be said that the petitioner was not willing to resume his duty so far as his new appointment in the said Service is concerned, but because of the aforesaid genuine difficulties, if extension was sought for, which was also granted initially, it should have been granted till the medical report was made available.

9. Under the aforesaid circumstances, in his submission, the order, cancelling his appointment, is arbitrary and illegal and that this Court should set aside the same and direct the respondents to appoint the petitioner on the said post on which he was selected earlier. Mr.Upadhyay has also attacked the impugned order dated 9.12.2000, by which his representation is rejected after the earlier order of the High Court on the ground that the reasons mentioned in paragraph 6 of the aforesaid order are wholly arbitrary, and on absolutely irrelevant grounds, the said representation is rejected and, according to him, on the face of it, the reasons given in paragraph 6 are arbitrary, misconceived and shocking, and, according to him, such reasoning is not expected from the Authorities.

On all the aforesaid grounds, therefore, the decision in question is challenged by the petitioner and appropriate writ, direction or order is prayed for by filing this petition.

10. The matter is opposed by the Department by filing affidavit-in-reply, at page 104. On behalf of the Department, one V.P.Pandya, Under Secretary, General Administration Department, has filed the affidavit-in-reply, denying the averments made in the petition and it is prayed that the petition deserves to be dismissed.

11. Mr.Kamal Trivedi, learned Additional Advocate General, along with Ms.Harsha Devani, Assistant Government Pleader, has supported the decision of the Department. It was submitted by the learned Additional Advocate General that, in the facts and circumstances of the case, the insistence on the part of the Department to report for duty first, without waiting for the report of the Medical Board is justified. It was submitted by Mr.Trivedi that similar treatment was given to all the candidates, who were selected by the GPSC, and that it is not the case where the petitioner is singled out or that he was given different treatment as compared to other candidates. Mr.Trivedi also pointed out that in view of

the fact that the appointments were held up since long, it was decided to give appointment forthwith to the selected candidates so that the Government work may not suffer.

Mr.Trivedi also further submitted that so far as Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 is concerned, the application of the said rule comes into picture only at the time when substantive appointment is made and not before that. In his submission, since the petitioner was appointed purely on ad hoc basis, and that too, temporarily, it was not incumbent upon the Department to comply with Rule 5 of the aforesaid Rules till permanent appointment is given after completing the probationary period and that, at the time of passing the confirmation order. Mr.Trivedi also further submitted that the order of cancellation was passed as back as in the year 1990 and that, now, select list is already exhausted and no post of that list is now available, especially when this Court has not passed any interim order in the writ petition, which was filed in 1990, to keep any post vacant or giving any interim order to the effect that the appointment in question shall be subject to the result of this petition. Under the circumstances, it is contended that it is too late in the day to contend that the petitioner should be given appointment on the basis of the selection of the year 1990. Mr.Trivedi also further submitted that, even otherwise, since the appointment order was not given to the petitioner and since the petitioner gave counter offer, the matter remained at the offer stage and that the said offer has not culminated into a final acceptance on the part of the Government. In his submission, therefore, since the request of the petitioner by way of counter offer is rejected by the Government and since on that ground, his appointment is cancelled, the master and servant relationship has never come into force as the counter offer is not accepted. He also further submitted that even if it is assumed that it was not open for the Department to give appointment without there being any medical report available on record before giving such appointment, yet it is open for the Government to relax the same under Rule 16 of the said Rules, as such powers for relaxation are available with the State Government.

Mr.Trivedi has relied upon the provisions of Rule 10 of the said Rules to substantiate his say that only at the time of making regular appointment on permanent basis, it is obligatory on the part of the employee to get himself medically cleared through medical examination

and it is not obligatory that even for making ad hoc appointment, this medical examination is a sine qua non. He also submitted that the petitioner was given reasonable time by giving extension and that after having waited for sufficient time for more than 42 days, ultimately, the appointment was cancelled. He submitted that if really the Department was vindictive or was keeping any grudge against the petitioner, there was no reason for the Department to give any such extension even though the services of such Officers were required immediately at the relevant time. He submitted that, in the facts and circumstances of the case, therefore, the action of the Government cannot be branded as arbitrary and discriminatory, and it cannot be said that any hostile treatment was given to the petitioner in any manner.

He also submitted that considering the fact that the appointment was to be made as back as in the year 1990, this Court now may not exercise its powers for setting aside the impugned order after such a long period and that if the petitioner is ordered to be appointed on the post of Deputy Collector after a period of 12 years of his selection, it will upset and disturb the administration, especially when now no post is kept vacant from that list which was prepared in the year 1990. He also submitted that in case the petitioner is to be accommodated again, then the selected candidates of the list will have to go home, especially when the said list is already exhausted and the waiting list has also already exhausted which was prepared at the relevant time. It is submitted that in case the petitioner is now to be accommodated in service, the Government will have to create a post in the nature of supernumerary post, which, according to him, may create administrative difficulties. It is, therefore, prayed that the petition deserves to be dismissed and no relief can be given to the petitioner after such a belated period.

12. I have heard the Advocates of both the sides in detail.

It is no doubt true that the petitioner, at the relevant time, was already serving with the Reserve Bank of India and that, therefore, there was some justification on his part in insisting for extension of time for the purpose of getting himself cleared through the medical examination so that in case such report is not in his favour, he may not lose employment with the Reserve Bank of India. However, the point which is required to be considered is whether the action of the

Government in cancelling his appointment is justified in the facts and circumstances of the case especially when after giving extension for some days, the petitioner failed to resume his duty even within the stipulated period. It is also required to be noted that at the time of issuing appointment orders, similar type of insistence was made from all the selected candidates without any exception and all were asked to report on a particular date without there being any medical examination, and, ultimately, medical examination was not treated as a condition precedent before joining duty. It is, no doubt, true that this Court (Coram : R.K. Abichandani, J.), while allowing the earlier petition of the petitioner, has made certain observations on Rule 5. It is observed by this Court as under :-

> " ... ...
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> 3. The facts on record show that the petitioner clearly was a victim of circumstances. He did appear before the Medical Board in good time, but was called again on 5.2.1990 for a repeat for X-ray. That was not a fault on the part of the petitioner. The petitioner was already given extension of time, in view of his apprehension that if he did not clear medical examination he might lose his existing job. In fact, as per rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967, no person can be appointed to any service or post if he had failed to pass the test for physical fitness. Therefore, if the petitioner did not pass the medical test, he could not have been appointed on regular basis to the post and since his appointment was subject to his passing medical test, he would have lost the job after having given up his existing permanent post in the Reserve Bank of India if he failed at the medical test. In view of the peculiar facts of this case, it would, therefore, be appropriate for the respondent Authorities to reconsider the case of the petitioner. The learned Counsel for the petitioner states that the petitioner will give a fresh representation in the matter and if the cancellation of his appointment order is withdrawn and his appointment order is restored, the petitioner will not claim any

> service benefit for the period prior to his reporting for duties. It was also submitted that the petitioner had other compelling reasons at the relevant time. Because his father had died when he was young and he had to look after his younger brothers and sisters he could not take the risk of losing his existing job in the Reserve Bank of India, when medical test for the new job was yet to be held. The facts clearly warrant reconsideration of the petitioner's case by the concerned authorities.
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> 5. It is, therefore, directed that if the petitioner makes representation within two weeks from today, the respondent authorities will consider the same sympathetically, keeping in view his high rank in the select list and the circumstances that may be pointed out by him, as also the requirement of Rule 5, which stipulated that no person could be appointed, if he had failed to pass medical test, and make a fresh order in accordance with law without being coloured by the order of cancellation of his appointment made earlier. This may be done within eight weeks of the receipt of the representation from the petitioner. Rule is made absolute accordingly with no order as to costs.
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> ... ..."

13. However, I cannot ignore the fact that the petitioner was given extension from time to time and, as a matter of fact, ultimately, about more than 40 days passed in that process and during the aforesaid period, it is an admitted fact that the petitioner has not resumed the duty, obviously because the question of medical examination was at a liquid stage at that time. It is also required to be noted that similar orders were passed against two other employees, whose reference is made in the order itself and since all the aforesaid candidates have failed to resume their duty within the extended period, their appointments were also cancelled. Considering the facts of the case and considering the documents on record, it cannot be said that any discriminatory treatment was given to the petitioner or

that he was singled out by the Department in any manner in giving such treatment. It is also required to be noted that at the relevant time, the Department wanted to fill up the posts which were created in the years 1983 and 1984, as the case may be, and there was administrative exigency to fill up the said posts immediately. Under these circumstances, if an insistence is made to report for duty, awaiting the medical examination, in my view, it cannot be said that the Government acted in any arbitrary or irrational manner, especially when this was an ad hoc appointment and it is always open for the Government to relax their own Rules. Even though for the time being it is presumed that the Government was not expected to relax the aforesaid provision, it can safely be said that the said relaxation was in favour of the employees, who were required to join the duty and such relaxation can never be said to be against the interest of such employees, who wanted to join the duty immediately. Therefore, it cannot be said that it is a condition precedent or a sine qua non to have medical examination before one is given appointment even on ad hoc or temporary basis. For this purpose, Reference to Rule 10 of the Bombay Civil Services Rules is required to be made. The said Rule provides as under :-

> " ... ...
>
> 10. Except as provided by this rule no person may be substantively appointed to a permanent post in Government service unless he produces a medical certificate of health which must be affixed to his first pay bill. The production of a fresh medical certificate under this rule is not necessary if the Government servant concerned has already produced a medical certificate as required by Rule 14 or Rule 14-C and has been in the service of Government since that time without a break.
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> Note :-Rules for the examination of candidates as to their physical fitness for Government service have been embodied in Appendix VII.
>
> ... ..."

It is, therefore, clearly mentioned in the said Rule that no person can be substantively appointed to a permanent Government post unless he produces medical certificate of

health.

Rule 16 of the Gujarat Civil Services (Classification of Recruitment) Rules, 1967 provides as under :-

> " ... ...
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> 16. Appointment by relaxation of rules:-Notwithstanding anything contained in these rules, the State Government may, in the interest of public service :-
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> (i) fill up a post by appointment of an officer of Defence Service or All India Service,
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> (ii) make appointment to any service or post by a method other than that prescribed under these rules, or
>
> (iii) relax any of the provisions of these rules :
>
> Provided that where the appointment to any service or post is to be made in consultation with the Commission, no such appointment or relaxation under clause (ii) or (iii) above shall be made except in consultation with the Commission.
>
> ... ..."

Accordingly, aforesaid Rule 16 gives general powers to the Government to give go-by to a particular provision of the Rules in the interest of public service. I, therefore, find considerable force in the argument of Mr.Trivedi, learned Additional Advocate General, that in view of the situation prevailing at the relevant time, considering the fact that the posts were lying vacant since long, it was decided by the Government to give appointment subject to the production of certificate of medical fitness, which can be deferred till the permanent appointment orders are given, and it cannot be said that the decision taken at the relevant time by the State Government in the matter of giving appointment is, in any way, illegal, arbitrary or discriminatory.

Learned Advocates of both the sides also frankly submitted that so far as the question of interpretation of Rule 5 is concerned, the said question is not at all

concluded by the earlier order of this Court in Special Civil Application No.6598 of 1999, and, according to them, the matter is at large on all issues. Learned Advocates further submitted that the observations in the aforesaid order were merely tentative, as, ultimately, the matter was remanded to the Department. It is required to be noted that the petitioner might have genuine difficulty at the relevant time in so far as joining duty is concerned, but when the Government wanted to fill up the post immediately in view of administrative exigency and for that purpose, further extension was not given to the petitioner, that, ipso facto, is not sufficient to jump to the conclusion that the said action on the part of the Department is arbitrary or discriminatory.

It is difficult to appreciate the argument of Mr.Upadhyay that the action of the Department is illegal or arbitrary, especially when similar treatment is given to all the candidates and Officers, who were selected for the posts in question without any exception. It is not possible for this Court to compel the Department that even if the request might be genuine, the same must be accepted, because, on the other hand, the difficulty of the administration is also required to be considered.

14. Mr.Trivedi has also highlighted the fact that the petitioner, in his earlier representation, has pointed out that, over and above the aforesaid difficulty of medical examination, there is another difficulty regarding giving notice to the Reserve Bank of India and even that was also a ground which was pressed into service by the petitioner for extension of time for the purpose of joining duty.

So far as the argument of Mr.Upadhyay regarding not giving the petitioner 30 days' joining time is concerned, in my view, it is always open for the State Government to relax the said condition, as such relaxation is ultimately in favour of the employee. Even otherwise, in the instant case, more than 40 days' time was given to the petitioner for the purpose of joining. Therefore, it is not possible to accept the submission of Mr.Upadhyay that simply because initially 30 days' joining time was not given, the said action of the respondent is illegal and arbitrary. In my view, it cannot be said that the Department has committed any irregularity in not granting 30 days' time at the first instance to the petitioner for joining his duty.

15. It is required to be noted that in view of the

earlier affidavit-in-reply filed in Special Civil Application No.6598 of 1990, the Department has, in detail, pointed out the reason for not giving further extension or not waiting indefinitely till the medical report was available. In the impugned decision dated 9.12.2000, certain reasons are given by the authority for the purpose of deciding the representation of the petitioner. It has been stated in the said decision that after 5th February, 1990, i.e. the date on which the medical examination was over, the petitioner could have informed the Department on 6.2.1990 or 7.2.1990 and that, ultimately, the order was cancelled on 13.2.1990. It is also further pointed out that after 5.2.1990, if the petitioner was really and genuinely interested, he should have made personal approach to the Authority, but he remained silent upto 13th February, 1990, i.e. the date on which the impugned order was passed. Further reasons are also given in the said paragraph. However, it is not necessary to examine all those reasons in detail, because, ultimately, the aforesaid reasoning is given in pursuance of the representation made by the petitioner for the purpose of reconsidering the earlier decision. In my view, of course, it may not be necessary for the petitioner to follow it up with the Department after 5.2.1990, by personally meeting the concerned authority, though, of course, to be on the safer side, it was expected from him to make some representation again after the aforesaid date, i.e. 5.2.1990, pointing out to the Department that he has already undergone the medical examination.

But, apart from the aforesaid aspect, the fact remains that the petitioner was given the appointment order and he was asked to report for duty without medical examination at par with the other selected candidates. Therafter, at his request, some extension was definitely given to him by the Department and, in the process, 42 days' time was given to him. It is required to be noted that it is always open for the Government to relax any of the Rules as indicated above, and there was nothing wrong considering the nature of the work, and in view of the administrative exigency, if the Government asked the employee to join duty first. Considering the fact that it was merely an ad hoc appointment, it cannot be said that there was any arbitrary action on the part of the authority in cancelling the appointment of the petitioner, if all these aspects are to be taken into consideration.

16. It is also required to be noted that the aforesaid select list was prepared as back as in the year

1990 and more than 12 years have passed by this time. The said list has already exhausted since long, as submitted by Mr.Trivedi, learned Additional Advocate General, and even the waiting list also exhausted since long. Under these circumstances, it would not be just and proper to direct the State Government to give appointment order to the petitioner even by creating a post to accommodate him. It is equally true that simply on that ground, if the petitioner is having a justifiable case, he cannot be denied relief only on the ground of delay since the matter was pending before this Court for so many years. However, considering the totality of the facts and circumstances of the case, as indicated above, i.e. extension granted to the petitioner for some time, the fact that similar orders were given to other employees, most of whom have joined their employment, and considering the fact that the insistence on the part of the petitioner in asking the Government first to comply with Rule 5 of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967, which, in my view, is not a justified insistence, it cannot be said that the decision taken by the Department in the year 1990 was, in any way, illegal, arbitrary or discriminatory. It is required to be noted that the petitioner was offered employment and, subsequently, he gave counter offer by way of asking sometime for the purpose of joining his duty. It is also required to be noted that the offer of the Government was not accepted by the petitioner and instead, he gave his counter offer in the nature of asking extension of time for the purpose of reporting for duty. Under the circumstances, it cannot be said that any contract of employment has taken place between the petitioner and the respondent. The point which is required to be seen is whether such insistence on the part of the petitioner was justified and whether denying further extension at the hands of the State Government can be said to be arbitrary, illegal or discriminatory. Considering the facts and circumstances of the case, I am of the opinion that, ultimately, if the Government has cancelled the appointment order after having waited sufficiently for the petitioner to join duty, it cannot be said that such cancellation is bad in any manner.

17. At this stage, reference is also required to be made to certain decisions cited by Mr.Trivedi, learned Additional Advocate General, for the respondent.

Mr.Trivedi has relied upon the decision of the Apex Court in Amrik Singh and others v. Union of India and others, AIR 1980 SC 1447 to substantiate his argument that it is always open for the Government to relax any of

the Rules.

As submitted earlier by Mr.Trivedi, Rule 16(iii) of the Gujarat Civil Services (Classification of Recruitment) Rules, 1967 also speaks about the powers of the Government to relax any of the provisions of the Rules in the interest of public service.

Mr.Trivedi has also relied upon the decision of the Apex Court in Union of India v. Rati Pal Saroj and another, AIR 1998 SC 1118. It has been observed in paragraphs 4, 7 and 8 as under :-

> " ... ...
>
> 4. The above facts show that the respondent had been offered an appointment to the Indian Administrative Service which he had accepted. The respondent, however, could not join Indian Administrative Service as a probationer within the prescribed period because he was not relieved from his previous post. Before the respondent could join the Indian Administrative Service as a probationer, the appointment is withdrawn or cancelled. Therefore, one thing at least is clear the respondent was not a probationer in the Indian Administrative Service on the date when his appointment was withdrawn or cancelled. He held the post of a Grade I Officer in the Central Secretariat Service on the date when the appointment was withdrawn and he continues to hold that post.
>
> xxx xxx xxx
>
> 7. The respondent, in the present case, is not, in the strict sense, governed by Regulation 13 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955, since the appointment has been withdrawn after the appointment order was issued and not before. The Indian Administrative Service (Probation) Rules of 1955 also do not apply to the respondent because he does not belong to the Indian Administrative Service as a Probationer. He is in the intermediate stage of a person who has

accepted the appointment offer but has not joined the new service. What are his rights?

8. His position appears more akin to the position of a selectee rather than a probationer because he has not joined the new service when the appointment is cancelled. He continues to belong to the Service which he had joined and to which he belonged prior to his present selection. One thing at least is clear - he cannot have higher rights than a probationer. It is well settled that a probationer's service can be terminated during the period of probation if he is found unsuitable. No enquiry is necessary for such termination of the services of a probationer In the case of Samsher Singh v. State of Punjab (1974) 2 SCC 831 : (AIR 1974 SC 2192), a Bench of this Court consisting of seven Judges, inter alia, held that the services of a probationer can be terminated when the authorities are satisfied regarding his inadequacy for the job, or unsuitability for temperamental or other reasons not involving moral turpitude, or when his conduct may result in dismissal or removal but without a formal enquiry. An enquiry is necessary only when the termination is by way of a punishment, and to determine this the substance of the order and not the form is decisive. The same position has been re-affirmed in Anoop Jaiswal v. Government of India (1984) 2 SCC 369 : (AIR 1984 SC 636) where the decision in Samsher Singh v. State of Punjab (AIR 1974 SC 2192) (supra) has been quoted extensively. Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. If it comes to the conclusion that the probationer is not suitable he is liable to be discharged. He cannot, in this situation, claim the benefit of Art. 311(2).

... ..."

Relying upon the aforesaid observations of the Apex Court, it is submitted by Mr.Trivedi that the position of the petitioner is that of a selectee candidate, rather than a probationer since he has not joined the new service when the appointment order was cancelled. He further submitted that the petitioner, therefore, cannot have any higher right than that of a probationer and if the services of the probationer can be terminated during the probationary period without any enquiry, it was open for the Department to cancel his appointment on the ground that he has not reported for duty. Relying upon the aforesaid observations, it was further submitted by Mr.Trivedi that by virtue of his appointment if any right is accrued in favour of the employee, that right has to be exercised within a reasonable time and it is not a right which remains for an indefinite period of time.

Mr.Trivedi has also relied upon the judgment of the Apex Court in Central Provident Fund Commissioner and others v. Ashok Dubey and others, (1993) 24 Administrative Tribunals Cases 824. He has relied upon the observations contained in paragraphs 18, 19 and 22 of the said judgment, which reads as under :-

> " ... ...
>
> 18. A list of 70 candidates was recommended by the Union Public Service Commission for appointment to the post of Assistant Provident Fund Commissioner (Grade I) in Employees Provident Fund Organisation. The respondent was admittedly one of the candidates so recommended. He was offered, by a memorandum dated June 25, 1990 a temporary post of Assistant Provident Fund Commissioner (Grade I) in the Employees Provident Fund Organisation, a statutory body under the administrative control of Ministry of Labour, in the scale of pay of Rs.2200-75-2800-EB-100-4000. The terms of appointment inter alia stated that the candidate would be allowed to join the post only on production of a valid discharge certificate from the present employer. This offer of appointment was accepted by the respondent on July 5, 1990. Thereafter, he wrote to the appellant that since he was working in Canara Bank he had to resign his post from the Bank, 3 months'

notice period would be required for acceptance of resignation. It was further stated by him that he had already sent a notice to the Bank to accept his resignation with effect from September 6, 1990. Further, it was added that should his services be required even earlier, the appellant might take up the matter with the controlling authority to have this 3 months' period waived.

19. The appellant wrote to Canara Bank on July 19, 1990 requesting the Bank to forward the personal file of the respondent containing medical fitness certificate, police verification certificate and performance assessment report in order to enable the appellant to issue the order of appointment for the post for which he had been selected. The respondent wanted to know as to what had happened to the issue of appointment order. The appellant informed on August 11, 1990 that his integrity certificate from the Bank was awaited but in the meanwhile he was directed to contact the office of the appellant at Patna for medical examination by the Medical Board. On September 12, 1990, again the Bank was reminded to take early action as to the acceptance of the resignation of the respondent which was getting delayed due to the pendency of disciplinary proceedings against him and a final decision may be taken at the earliest.

xxx xxx xxx

22. Then comes the ultimate letter dated April 8/9, 1991 in which the stand of the appellant is reiterated, namely, that Canara Bank, the present employer of the respondent had intimated to the office of the appellant that some disciplinary proceedings have been initiated/pending against him and hence his resignation had not been accepted. In the previous letter dated February 27, 1991 also it had been stated by the Bank that the inquiry in respect of some charge-sheets had not been completed. It is under these circumstances

the offer of appointment was cancelled.

... ..."

Mr.Trivedi has also relied upon the judgment of the Apex Court in Chandu Lal v. Ram Dass and another, 1969 S.L.R. 475. He has relied upon paragraph 6 of the said judgment, which is as under :-

" ... ...

6. However, in the present case, it appears to us that we need not express any final opinion on this point, because we are of the view that the order of appointment in the case of Saloch relied upon by the appellant was not an unconditional order and could not, therefore, take immediate effect. It may be that, as a result of the order, a contract of service may have come into existence; Saloch, under that order, was required to report himself immediately to the Director of Agriculture, even though he had been appointed to a post at Government Agriculture Farm Talab Tilco Jammu. Thus, before taking over the appointment in this post, Saloch was required to report to the Director of Agriculture at a different place. Suppose, Saloch did not report to the Director of Agriculture for five years: can it be held that he would have continued to hold the office of Agricultural Assistant at the Farm at Talab Tilko Jammu during all those five years? The answer must obviously be in the negative. It seems to us that this order of appointment could only become effective if Saloch first complied with the preliminary condition of reporting to the Director of Agriculture; and it is not the case of any party that, before the date of scrutiny, Saloch reported to the Director of Agriculture in order to comply with this pre-condition. In these circumstances, we must come to the conclusion that the High Court was right in its decision that Saloch was not holding a post under the Jammu and Kashmir Government on the date of scrutiny.

... ..."

Mr.Trivedi has also relied upon the judgment of the Apex Court in the case of Shyamalendu Nag v. State of Manipur and others, AIR 1992 SC 1596. In the said judgment, the High Court came to the conclusion that since the appointment order itself indicated that if the candidate failed to report for duty by the prescribed date, the offer would be treated as cancelled and that the State authorities could not be expected to wait for the selected candidates indefinitely. In the said case, submission was made on behalf of the Government Advocate that during the course of the hearing before the High Court, another candidate was already appointed accordingly. Under the said circumstances, the Supreme Court negatived the contention of the petitioner before the High Court and, ultimately, the Supreme Court has approved the said decision by observing that no view other than the one taken by the High Court is possible.

Mr.Trivedi has also relied upon the decision of the Apex Court in G.C. Gupta and others v. N.K. Pandey and others, AIR 1988 SC 654. The relevant observations are contained in paragraph 16 of the aforesaid decision. The said paragraph 16 reads as under :-

> " ... ...
>
> 16. Inordinate delay is not merely a factor for the Court to refuse appropriate relief but also a relevant consideration it be so minded not to unsettle settled things. As observed by Khanna, J. in delivering the judgment of the Court in Malcom Lawrence Cecil D'Souza v. Union of India, (1975) Suppl SCR 409 : (AIR 1975 SC 1269 at p. 1272) :
>
> "(B)y and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and

> difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matter should be given a quietus after lapse of some time."
>
> ... ..."

Relying upon the the above observations of the Apex Court in the aforesaid case, Mr.Trivedi argued that in view of the long passage of time, no relief can be given to the petitioner.

Relying upon the aforesaid observations in the aforeaid judgment of the Apex Court, Mr.Trivedi argued that in view of the fact that the appointment orders are already given to the selected candidates as back as in the year 1990, the said issue is not now required to be reopened in the interest of proper functioning and morale of the personnel concerned in the Service, as, in his submission, it may affect other candidates who were selected since long and especially when, in his submission, no vacant post is available as on today.

18. Considering the aforesaid aspect of the matter and considering the law laid down by the Apex Court on the issue, I am of the opinion that the State Government, after waiting for considerable time, ultimately, cancelled the appointment of the petitioner and, therefore, it is not possible to give any relief to the petitioner considering the facts and circumstances of the case. It is also required to be noted that simply because the petitioner was placed in the select list and simply because the petitioner was selected and offered appointment, it cannot be said that any enforceable right is created in his favour and till he had resumed his duties, the matter remained at an offer stage and the offer was not concluded since the petitioner has not resumed the duty by taking the charge.

19. Mr.Upadhyay has frankly submitted that he is not challenging the action of the respondent on the ground of mala fides or arbitrariness. But, according to him, the action of the respondent in cancelling his appointment is arbitrary and unreasonable. However, in view of the aforesaid discussion, I am of the opinion that the said decision of the respondent cannot be said to be arbitrary or illegal in any manner and it was open for the State Government to appoint someone else from the select list if the other selected candidate failed to resume duty within the stipulated time, and it was not expected from

the State Government to wait indefinitely for an inordinately long period in view of the administrative exigency. Therefore, considering the aforesaid factual aspect of the matter and considering the law laid down by the Apex Court in various judgments, on which Mr.Trivedi has relied upon, I am of the opinion that the action of the State Government in cancelling the appointment order of the petitioner is not required to be interfered with by this Court. It is now not possible to direct the respondents to appoint the petitioner on the basis of his selection in the year 1990 and to give him posting order for the post on which he was selected more than a decade back.

Under these circumstances, I do not find any substance in any of the arguments of Mr.Upadhyay and, therefore, the petition, in my view, is required to be dismissed and it is accordingly dismissed. Rule is discharged with no order as to costs.

13th February, 2002 (P.B. Majmudar, J.)

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(apj)